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THE ELECTRONIC COMMUNICATIONS AND PRIVACY ACT: DISCRIMINATORY TREATMENT FOR SIMILAR TECHNOLOGY, CUTTING THE CORD OF PRIVACY

It has often been noted that the development of electronic communications has brought the people of our Nation and the world closer together, and has served to create new business and personal relationships and to enhance old ones. With these benefits, unfortunately, the development of electronic communications has also provided unscrupulous individuals with the opportunity to intrude upon the privacy of a conversation through the use of wiretaps or radio receiving devices.¹

I. INTRODUCTION

When Alexander Graham Bell made his dream of talking through wires a reality,² he probably never imagined some day people would eliminate the need for wires altogether. In the past, although communications over any distance were difficult,³ with the
use of wires, people were able to talk to others directly. Today, these wires are no longer necessary because wireless communications are a reality. There are millions of both cellular and cordless phones in the English used smoke signals to communicate. Id. at 15. While the Swiss and Austrians yodelled, a very loud cry, in order to communicate from mountain peak to mountain peak, the Africans developed a complex communication system that utilized drums. Id. at 17. By changing pitch, the drummer imitated the native people’s language. Id. The American Indians also developed a rare and complex smoke system. Id. at 17-18. By using a blanket to control the rising smoke, the Indians could communicate great distances. Id. at 18.

Another concern of the people was communication between ships. To overcome this difficulty, sailors developed flaghoist. Id. at 19. Flaghoist involved a set of different colored and shaped flags which in distinct combinations represented various letters. Id. All these previous systems had one element in common. They were in the open so that anyone could hear or see them. Therefore, they all lacked privacy. Cf. id. at 17 (African drums were not private).

With the discovery of electricity, people began to develop techniques to communicate that utilized wires. Id. at 33-37. In 1833, the Germans developed the first telegraph system. Id. at 37. Although this system was crude, the Germans were able to communicate up to 2.3 kilometers, the length of the wire. Id. Ten years later, in 1843, the United States authorized Samuel Morse to install telegraph wires from Washington, D.C. to Baltimore. Id. at 42. Seventeen years later, telegraph wires linked most major U.S. cities. Id. Although people were able to communicate with others on their continent, transatlantic communication was still difficult. Id. at 45. It was not until 1866 that the English laid the first successful under water cable. Id. at 49. The cable connected Ireland and Newfoundland. Id. For a discussion of transatlantic communication, see A. CLARKE, VOICE ACROSS THE SEA (1974). Thirty-some years later, Guglielmo Marconi made radio communication possible. J. JESPERSEN & J. FITZ-RANDOLPH, supra, at 61-65.

4. For the number of cellular and cordless phones in use, see infra note 7.

5. Cellular phone technology was developed in 1960. Berresford, The Impact of Law and Regulation on Technology: The Case History of Cellular Radio, 44 BUS. LAW. 721 (1989). Cellular phones, also known as portable phones, replaced the mobile telephone. Id. For a discussion of mobile phones, see infra note 18. A cellular phone service supplier divides a large geographic location into honey-comb shaped “cells.” S. REP. NO. 99-541, 99th Cong., 1st Sess., reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3555, 3563 [hereinafter ADMIN. NEWS]. In each cell, there is a low powered radio transmitter also known as a base station. Id. The phone, located in a car, operates on radio waves. Id. In-coming or out-going calls travel between the car and the tower over radio waves. Id. From the station, the call is either transmitted to another base station, in which case, the frequency of the transmission is automatically changed, or the communication enters the wire telephone lines. Id. As a car travels between cells, the frequency of the transmission changes automatically. Id.

When this comment refers to protection of cellular and cordless phones and communications over them, this is only a reference to the radio portion of these devices. The communication while in the normal land wire, is definitely protected by 18 U.S.C. §§ 2510-11 (1988), which states “[e]xcept as otherwise specifically provided . . . any person who willfully intercepts . . . any wire . . . communication shall be fined not more than $10,000 or imprisoned not more than five years, or both.” It is only the radio portion of wireless communications that raise privacy issues.

6. Cordless phones are similar to cellular phones, in that they also operate on radio waves. ADMIN. NEWS, supra note 5, at 3563. However, cordless phones operate over a much smaller distance. See Mauro, Law Sits Idle as “Snoops” Call The Shots, USA Today, April 20, 1990, at 2, col. 1 (average range of cordless phone is 1000 feet or less) [hereinafter Mauro]. A cordless phone consists of a handset and a base unit. ADMIN. NEWS, supra note 5, at 3563. The communications travel between the base unit and hand set in the form of AM/FM radio waves. Id. Because cordless phones operate in a “duplex mode,” simultaneous transmitting occurs, which results in a con-
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use today.\(^7\) Cordless phones are radio transmitters that operate over distances of less than a thousand feet.\(^8\) Similarly, cellular phones are also radio transmitters that operate over greater distances.\(^9\) With the advanced technologies of cellular and cordless phones, individuals who are concerned about the confidentiality of their communications\(^10\) are now able to use these phones to conduct business and continuous conversation. 48 Fed. Reg. 4788 (1983). Thus, by utilizing radio waves, the cord of a standard telephone is eliminated, and the user has greater freedom and mobility. \textit{Id.}


8. Mauro, supra note 6, at 2, col. 1. For a more detailed discussion of how cordless phones operate on radio waves, see supra note 6.

9. ADMIN. NEWS, supra note 5, at 3563. For how cellular phones operate as radio transmitters, see supra note 5.

10. See Lezin, \textit{Calling All Cars, Cellular Telephones Can Convert Commuting Time Into Billable Hours}, 8 CALIF. LAW. 77 (1988) (one in every three American Bar Association members has a cellular phone); see also Lopez, supra note 7, at 1, col. 1 (lawyers, engineers and sales agents use cellular phones to conduct business).

Doctors also conduct business over cellular phones and are concerned about the privacy of their communications. See \textit{Dr. G. v. Bell Atl. Mobile Phones}, No. 89-1967 (E.D. Pa. July 14, 1989) (1989 WL 79354). In \textit{Dr. G.}, the plaintiff, a doctor, had conducted business and personal affairs from his car phone and he was concerned with the privacy of his conversations. \textit{Id.} In fact, the Dr. was so concerned with his privacy and the privacy of his clients, that he used a pseudonym in his complaint. \textit{Id.} at 3.

Another privacy issue that may arise is how communications over a cellular or cordless phone affect the attorney-client privilege. The attorney-client privilege only protects the client's communications to his attorney or the attorney's agent if 1) the communication deals with the attorney giving legal advice; 2) is made with the expectation of confidentiality; 3) is not in furtherance of a future crime or tort; and 4) the client has not waived the privilege. Spahn, \textit{Making and Breaking the Attorney-Client Privilege}, 35 PRAC. LAW. 61, 62 (1989); see generally Note, \textit{The Attorney Client Privilege}, 19 U:RICH. L. REV. 559 (1985) (discussing the attorney-client privilege, scope, limitations and application). This privilege is based on the client's expectation of privacy. Spahn, supra, at 64. Some courts have held that a person does not have a reasonable expectation of privacy when he communicates over a radio phone. For a discussion of privacy expectations over cellular and cordless phones, see \textit{infra} notes 49 and 61-75 and accompanying text. Therefore, communications between the attorney and his client may not be privileged when they use a cellular or cordless phone. For example, if the attorney initiates the conversation from his car phone, he knows the communication may not be private. Therefore, the attorney-client privilege never arises. \textit{Cf.} Spahn, supra, at 64 (no privilege if client did not expect privacy). However, if the privilege existed and the attorney initiates the conversation from a cellular phone, the attorney may have breached his ethical obligations and be subject to disciplinary actions. \textit{Cf.} ILL. REV. STAT. ch. 110a, Canon 4, Rule 4-101 (1987) (disciplinary rules); \textit{Model Rules of Professional Responsibility} Rule 1.6 (1987) (confidentiality of information). In contrast, if the client knows that the attorney is on the car phone, and continues to communicate with him, this may act as an express waiver of the privilege by the client. \textit{Cf.} Spahn, supra, at 66 (client may waive privilege). The express waiver may also arise when the client initiates the communication from a cellular phone. The same issues arise if the attorney or client were using a cordless phone as opposed to a cellular phone.
personal affairs from their backyards, cars or even airplanes. These new phones, however, have their drawbacks.

To the surprise of many people, because cellular and cordless phones utilize radio waves, other individuals with the proper equipment can intercept these communications. In order for society to use this technology or any other technology to its full potential, the law must change and advance with the change in science. The law, therefore, must protect the privacy of these communications. Congress made an effort to advance the laws to keep pace with the technology when it amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") with the Electronic Communications Privacy Act of 1986 ("ECPA"). Congress' attempt provides cellular communications protection from unauthorized interference, but leaves cordless phones unprotected. This comment asserts that Congress should protect cordless phone communications just as it protects cellular communications. Part II of

11. See 49 Fed. Reg. 8, 1512 (1984) (range of cordless phone is 300 feet on average); Mauro, supra note 6, at 2, col. 1 (range of cordless phone less than 1000 feet); see also Lopez, supra note 7, at 1, col. 1 (cellular phones are found in cars, trains, airplanes). Suggestions are being made to place cellular phones along hiking trails. See Lopez, supra note 7, at 1, col. 1.

With greater mobility, people can conduct their business more easily. For example, William J. Higgins, a stock trader, had for several years used a portable phone to conduct business from the floor of the New York Stock Exchange. NYSE Ban on Portable Phones Upheld, N.Y.L.J., Jan. 25, 1989, at 1, col. 3. Mr. Higgins began to use a portable phone on the floor in 1987, although he has argued for their use since 1981. Id. He claimed that the portable phone helped traders better serve their clients and is a "cost-saving device." Id. Even against the claims of Mr. Higgins, the Securities Exchange Commission banned the use of portable phones on the floor of the New York Stock Exchange. Id.

12. For a discussion of how cellular and cordless phones operate, see supra notes 5 and 6.

13. For a discussion of how communications over radio telephones are not private, see infra notes 43-47 and accompanying text.


16. For discussion of ECPA, see infra notes 81-87 and accompanying text. One commentator has stated:

Technology moves on. It may take the legislature years to hammer out the definitive expressions of its wishes in an area, only to have a new technological development render the statute meaningless, or at least not as comprehensive as intended. For instance, a hole in the coverage of the 1968 federal wiretapping law has been opened because the act's complex definition of "wire communication" has been held not to include a recent and popular device, the cordless telephone.


17. For a discussion of why the ECPA should protect cordless phones, see infra
this comment presents a brief background on the history of cellular and cordless phones. Part III addresses the inadequate protection for privacy over radio communication devices prior to 1986. In so doing, part III examines the fourth amendment and the reasonable expectation of privacy and Title III. Part IV reviews the present position of the law under the ECPA and explains why cordless phones are treated differently from cellular phones. Finally, part V analyzes possible solutions to the privacy problems that plague users of cellular and cordless phones and determines that statutory protection is the best solution.

II. BACKGROUND

A. Cellular Phones

Although mobile phone technology, the predecessor of cellular phones, was available in the 1920's, the industry did not begin to develop until 1949. About that time, American Telephone and Telegraph ("AT&T") had convinced the Federal Communications Commission ("FCC") to allocate frequencies from the radio spectrum for mobile phone use. Because the FCC did not foresee the future demand for mobile phone technology, it only allocated a small number of frequencies for mobile phone use. This lack of available radio frequencies limited the mobile phone industry.

By 1968, however, the FCC realized the mobile phone industry's potential and considered allocating a large number of frequencies for mobile phone use. In 1970, the FCC authorized AT&T to test a cellular phone service in an urban setting. By 1974, the FCC ap-

notes 138-42 and accompanying text.
18. Mobile phones were the predecessors to cellular phones. Berresford, supra note 5, at 723. In 1949, the FCC allocated a very small number of frequencies for mobile phone use. Id. As a result of the limited availability of frequencies, the mobile industry was quite small and not very efficient. Id. Instead of the multiple towers and cells that make up a cellular phone service, there was frequently only one tower that served an entire city. Id. at 723. For discussion of cellular phones and multiple towers, see supra note 5. This one tower area would be approximately seventy-five miles in radius. Berresford, supra note 5, at 723. Therefore, a frequency used in one area could not be re-used for other communications in the same area unless it was outside the seventy-five mile area. Id. As a result of the limited number of frequencies that were in use, the system could only handle twenty-three simultaneous conversations. Id. Because of the limited capability of mobile phones, they "became viewed as toys for a few 'fatcats.'" Id. at 724.
20. Id. The FCC allocated frequencies for mobile phone use. Id.
21. Id. The FCC reasoned that the public use of same frequencies outweighed the demand for mobile services. Id.
22. Id. at 724. The mobile phone industry could only serve a maximum of 250 customers. Id.
23. Id. at 724-25. The FCC considered high capacity mobile phone systems. Id.
24. Id. at 725. AT&T began testing cellular phones in Newark and Philadelphia.
proved the use of cellular communications, and allocated frequencies for cellular use.\textsuperscript{25} As a result of the frequency allocation, the cellular industry steadily grew through 1983\textsuperscript{26} and thereafter its growth accelerated up to today.\textsuperscript{27}

B. Cordless Phones

Cordless phones appeared on the United States market at about the same time the cellular industry began its testing.\textsuperscript{28} In 1973, the FCC authorized cordless phone use under the provisions for low power communication devices.\textsuperscript{29} Unlike the cellular phone industry, however, the FCC did not require an individual to have a license to operate a cordless phone.\textsuperscript{30} Because of a conflict between the unlicensed cordless phones and the licensed citizen band ("CB") operators, the FCC changed the frequency allocation for low powered voice transmitters.\textsuperscript{31} Presently, the FCC classifies cordless phones as restricted radiation devices.\textsuperscript{32} Under this classification, people may continue to operate cordless phones without a license so long as the energy emissions do not exceed a certain level, and the system does not interfere with other authorized radio communications.\textsuperscript{33}

III. Protection for Wireless Phones Prior to the ECPA

Prior to the amendments to the federal wiretap laws, the fourth amendment of the United States Constitution and Title III pro-

\textsuperscript{25} Id. at 725. In 1974, Bell Labs reported to the FCC that cellular phone technology was successful. \textit{Id}.

\textsuperscript{26} Id. at 727 (cellular industry grew extensively). The first commercial cellular service began on October 13, 1983, in Chicago, Illinois. \textit{11 McGraw-Hill Encyclopedia of Science and Technology, Mobile Radio} 289, 290 (1987). The service consisted of 17 cells totalling 2400 square miles, and could serve a maximum of 100,000 subscribers. \textit{Id. But see supra} note 18 (mobile phones could handle only twenty-three conversations at once). Cellular phones became more efficient than mobile phones because more cellular phones could operate at the same time by re-using the same frequencies. \textit{11 McGraw-Hill, supra}, at 290.

\textsuperscript{27} See \textit{11 McGraw-Hill, supra} note 26, at 290 (cellular services had spread to all other major United State cities by 1985).


\textsuperscript{29} Id. When cordless phones first appeared, they operated between 26.9-27.3 MHz. \textit{Id}.

\textsuperscript{30} Id. Cordless phones could operate under Subpart D of Part 15 of FCC Rules without an individual license. \textit{Id}.

\textsuperscript{31} Id. at 363-64. The FCC faced enforcement problems because of a conflict between cordless phones and CB operators. \textit{Id}.

\textsuperscript{32} \textit{In re American Telecommunications Corp. and Elec. Indus. Assoc.}, 91 F.C.C.2d 362, 365 (1982). Cordless phones are now classified as radiation devices and can operate without an individual license under § 15.7 of FCC rules. \textit{Id}.

\textsuperscript{33} Id. The FCC placed restrictions on the energy output of cordless phones. \textit{Id}.
tected telephone communications. While the fourth amendment only protects individuals from public agents and governmental surveillance, Title III provided protection from both government agents and private citizens.

A. The Fourth Amendment and the Reasonable Expectation of Privacy

In the seminal case *Katz v. United States*, the Supreme Court defined the criteria for a constitutional fourth amendment search. The Court held that the fourth amendment protects people and not places. In order for the fourth amendment to protect an individual's privacy, the individual must exhibit a subjective expectation of privacy that is reasonable under the circumstances. The Court

34. See generally Note, Title III Protection For Wireless Telephones, 1985 U. Ill. L. Rev. 143 (discussing Title III protection for radio telephones). Congress passed Title III to regulate federal electronic surveillance of wire and oral communications. Id. The fourth amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV (1791).

35. See Note, supra note 34, at 146 (Title III prevents a private citizen from willfully intercepting wire or oral communications); see also Note, Private Interceptions of Wire and Oral Communications Under Title III: Rethinking Congressional Intent, 16 Am. J. Crim. L. 181, 185, 187 (1987) (Title III prohibited all unauthorized eavesdropping by both private persons and government officials) [hereinafter Note, Title III]; Comment, Cordless Telephones and the Fourth Amendment: A Trap for the Unwary Consumer, 73 Ky. L.J. 1167, 1170 (1984-85) (Congress adopted Title III to protect the privacy of wire and oral communications); Note, Don't Touch that Dial: Radio Listening Under the Electronic Communications Privacy Act of 1986, 63 N.Y.U. L. Rev. 416, 429 (1988) (the fourth amendment protects individuals only from searches and seizures by government officials) [hereinafter Note, Privacy Act].


38. *Katz v. United States*, 389 U.S. 347, 351 (1967). The *Katz* court was not concerned with what area the fourth amendment protects because the Court held that the fourth amendment protects persons and not places. Id. Presently, there are only three exceptions to the fourth amendment's requirement of a search warrant before the police can conduct a search. Fiala, supra note 36, at 16. Among these exceptions are the search incident to an arrest, a search of an automobile and a search pursuant to an emergency. Id. Consent by one of the parties to a communication may also permit a law officer to listen to a conversation without a warrant. Id. The consent exception is based on the premise that the nonconsenting party "assumes the risk" that the other party will reveal the conversation to the police when he voluntarily speaks to the consenting party. Id.

39. See *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (fourth amendment protection requires a subjective expectation of privacy which is reasonable); People v. Fata, 529 N.Y.2d 683, 686, 139 Misc. 2d 979, 983 (Ct. Ct. 1988) (two elements to reasonable expectation of privacy); see also Comment, supra note 35, at 1179 (reason-
found that surveillance of a telephone conversation constituted a search and, therefore, was subject to the fourth amendment.\(^4\) Hence, where there was a reasonable expectation of privacy, the government could not conduct surveillance without a warrant.\(^1\)

Therefore, if an individual using a cellular or cordless phone can establish a reasonable expectation of privacy, the fourth amendment will protect his communications. The average person, however, is unaware that radio communications\(^8\) travel freely through the air, and that anyone with the proper equipment can intercept them.\(^3\) This lack of awareness has created a false impression that such communications go unintercepted.\(^4\) Despite society's expectation that radio communications are private,\(^4\) in *Edwards v. Bardwell*,\(^4\) the court reasoned that it only takes a basic understanding of physics to realize that radio communications are not secure.\(^7\) Thus, according to the *Edwards* court, any encyclopedia could provide enough knowledge so that anyone with the proper equipment could intercept radio communications.\(^8\) To inform cordless phone users that these communications may be intercepted, the FCC has required manufacturers to mark cordless phones with a label that states communications over cordless phones are not private.\(^4\) This labeling re-

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40. *Katz*, 389 U.S. at 353 (electronic listening constituted a search and seizure and was subject to the fourth amendment's warrant requirement).
41. *Id.* The *Katz* court held that the petitioner had a justified expectation of privacy in a phone booth. *Id.*
42. For a discussion of how cellular and cordless phones utilize radio waves, see *supra* notes 5 and 6.
43. *See Comment, supra* note 35, at 1168 (average person is unaware of technology behind cordless phones).
44. *Id.* The average person is unaware that with the use of radio waves, his communications over a cordless phone are no longer private. *Id.*
45. *Dial P. for Privacy* (NBC news broadcast, special report by Rich Samuels, Feb. 6, 1990) (people when questioned believed cordless phones were private) [hereinafter NBC news].
47. *Id.* at 586-87 (any standard encyclopedia can explain the physics behind radio communications).
48. *Id.* at 586. Anyone with the proper equipment can easily intercept radio waves. *Id.*
49. *See Wisconsin v. Smith, 149 Wis. 3d 89, 104, 438 N.W.2d 571, 577 (1989)* (FCC requires labelling of cordless phones); *see also* 50 Fed. Reg. 24514 (1985) (for the public's benefit FCC requires labelling of cordless phones). The label that a cordless phone manufacturer must attach to the base unit must state:
This cordless telephone system operates under Part 15 of FCC Rules. *Privacy of communications may not be ensured when using this phone.* Operation is subject to two conditions: (1) It may not interfere with radio communications; and (2) it must accept any interference received, including that which may cause undesirable operation.
Telecommunication, 47 C.F.R. § 15.236 (1988) (emphasis added). The FCC has also required manufacturers to label the cordless phone box. *Id.* This warning should state:
Notice: The base units of some cordless telephones may respond to other
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quirement, and the manuals that accompany the cordless phone, thus place the individual on notice that communication over a cordless phone is not private. As a result, the label has made a subjective and reasonable expectation of privacy a legal impossibility.  

Notwithstanding the warning labels, many individuals continue to believe that their conversations on a phone, cordless or otherwise, are private. Nevertheless, some lower courts have held that a reasonable person should not expect communications over cordless or cellular phones to be private. Since there is no subjective or reasonable expectation of privacy, the courts do not afford the individual any protection under the fourth amendment.

B. Title III Protection for Communications

Because the fourth amendment does not protect individuals from private citizens intercepting telephone communications, Congress passed Title III. Under Title III, unless a court had issued a warrant, it was illegal for government officials or private citizens to intercept "wire communications" or "oral communications accompanied with a reasonable expectation of privacy." Title III worked well when radio communications were not prevalent, but today's advanced technological development of cellular and cordless phones rendered Title III, as originally passed, inadequate.
Cellular and cordless phones both utilize radio waves to transmit communications. Therefore, they did not fit neatly into the “wire communications” category which Title III protected. Furthermore, Title III applied to common carriers, which are no longer the sole suppliers of telecommunications. As a result, the courts have attempted to provide judicial protection for these communications.

In *United States v. Hall,* the issue was whether Title III prevented the interception of cellular phone communications. In *Hall,* the Ninth Circuit Court of Appeals interpreted Title III in such a manner that its interpretation led to a ridiculous result. The court classified communications between a mobile phone and a land-line telephone, the ordinary telephone lines, as wire communications. The court held that when a communication originates or ends on a land-line telephone, the entire communication is a wire communication and protected by Title III. However, if the communication

vacancy Act, supra note 35, at 430-31 (radio communications do not fit neatly into Title III categories).


59. 18 U.S.C. § 2510(1) (1982). A wire communication under Title III was: any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications. Id. (emphasis added).

60. H.R. Rep. No. 647, 99th Cong., 1st Sess., 2 (1986) (numerous entities other than common carriers provide electronic communication services). One example of a non-common carrier is private branch exchange (“PBX”). Id. PBX is equipment owned or leased by private parties that connect their telephones and data terminals to the local exchange carrier. Id.

61. For an explanation of how courts have tried to interpret Title III, see infra notes 61-75 and accompanying text.

62. 488 F.2d 193 (9th Cir. 1973) (addressed mobile phones). In *Hall,* a housewife, while listening to a megacycle radio, had intercepted Hall’s communications. Id. at 194-95. Hall had been speaking on a mobile phone. Id. After a month of listening to Hall’s conversations, she reported the broadcasts to the police. Id. at 195. Without a warrant, the Arizona Department of Public Safety also began to monitor Hall’s conversations. Id. They then arrested Hall, and he was convicted for possession of marijuana. Id. at 194.

63. Id. at 197. The *Hall* court stated its classification was absurd. Id.

64. Id. The *Hall* court held that communications between land-line and mobile phones are wire communications. Id.

65. Id. Title III protects communications originating or ending on land-line phones. Id.
originates and ends on mobile telephones, the communication is oral and not protected by Title III.66 This illogical distinction by the court's own admission is absurd.67 At some point of both a land-line to a mobile or mobile to mobile communication, the communication leaves the wire.

In Edwards v. Bardwell,68 a case that also addressed whether cellular phone users had a privacy expectation under Title III,69 the Fifth Circuit Court of Appeals held that communications which originated over radio telephones were oral communications.70 Thus, Title III, which statutorily required a reasonable expectation of privacy for oral communications, did not protect radio telephones.71 Since anyone who wanted to intercept radio waves could do so, there was no reasonable expectation of privacy for cellular phone users.72

Finally, in Rhode Island v. Delaurier,73 the Supreme Court of Rhode Island examined whether cordless phone users had a privacy expectation protected by Title III.74 The Delaurier court held that cordless phones were not wire communications and therefore not protected by Title III.75 Furthermore, the court found that cordless phone users were analogous to cellular phone users in that they have no justifiable expectation of privacy.76 The case law illustrates the

66. Id. (Title III does not protect communications that both originate and end on mobile phones).

67. See id. (court admitted its distinction was absurd); see also Wisconsin v. Smith, 149 Wis. 2d 89, 99, 438 N.W.2d 571, 575-76 (1989) (Hall decision routinely criticized).

68. 632 F. Supp. 584 (M.D. La. 1986). In Edwards, Doe, using a Bearcat scanner, intercepted Edwards' cellular communication. Id. at 586. Edwards had been speaking to his attorney about criminal activity. Id. Doe taped the conversation and presented the tape to the U.S. Attorney, Bardwell, who prepared a manuscript of the tape. Id. Edwards initiated a civil action under 18 U.S.C. § 2520 against Bardwell. Id. at 585. The court granted the defendants motion for summary judgment. Id. at 589.

69. Id. The Edwards court addressed the privacy of cellular phones. Id.

70. Id. at 589. When either end of a communication originates over a radio phone, it is an oral communication. Id.

71. Id. at 587-89. Without a reasonable expectation of privacy, Title III could not protect radio communications as oral communications. Id.

72. Id. at 587-89. Since there is no reasonable expectation of privacy for communications over cellular phones, Title III cannot protect these communications as oral communications. Id. Title III only protects an oral communication if the person uttered it “exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” 18 U.S.C. § 2510 (1982).

73. 488 A.2d 688 (R.I. 1985). In Delaurier, a young boy, while listening to his AM radio, intercepted Delaurier's cordless phone communication. Id. at 690. The boy's mother learned of the conversation and contacted the police, who used the boy's radio to monitor Delaurier's conversations. Id. For the next several weeks, the police heard several conversations that dealt with the sale of drugs, gambling and prostitution. Id. With a search warrant, the police arrested Delaurier. Id.

74. Id. The Delaurier court examined the privacy of cordless phones under Title III. Id.

75. Id. at 693-94. The Delaurier court held that Title III does not protect the privacy of cordless phones. Id.

76. Id. at 694. For examples of other courts that have addressed cellular or cor-
courts' unwillingness to find a reasonable expectation of privacy for those who communicate over cellular and cordless phones. Without judicial recognition of a reasonable expectation of privacy, the fourth amendment provides no protection for these wireless communications. In addition, Title III was insufficient because the courts could not realistically interpret the statute in a manner that would protect radio communications the same as wire communications. Therefore, in 1986, Congress amended Title III in order to protect the privacy of cellular phone users.

IV. THE ECPA: PRESENT PROTECTION FOR CELLULAR AND CORDLESS PHONE USERS

In response to the cellular phone industry's heavy lobbying, Congress amended Title III of the federal wiretapping laws to provide protection for some radio communications. Titled the ECPA, the 1986 amendments to Title III protect cellular phones by including cellular phones in the definition of wire communication. The Act, however, explicitly excluded cordless phones from its protection. Consequently, although Congress completely removed the
need to establish a reasonable expectation of privacy for cellular phone communications, cordless phone communications are still without the protection they need.\textsuperscript{84}

The ECPA authorizes a court to exclude from use at trials evidence obtained from the unauthorized reception of cellular phones.\textsuperscript{85} Those who commit the unauthorized receptions are also subject to criminal penalties.\textsuperscript{86} Furthermore, the ECPA allows the offended party to bring a civil action against the person who intercepted the communications.\textsuperscript{87} However, the ECPA provides for, in certain instances, procedures that would allow authorized reception of cellular communications.\textsuperscript{88}

In contrast, Congress has not provided any protection for cordless phone users.\textsuperscript{89} Congress justified the different treatment for

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Id. § 2510(1). An electronic communication does not include “the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.” \textit{Id.} § 2510(12)(A). Since the ECPA prohibits disclosure of wire, oral and electronic communications, and cordless phones are neither a wire nor an electronic communication, the ECPA does not protect cordless phones as such. Instead, cordless phones are oral communications, but do not fulfill the requirement for oral communication protection. The Title III standard for oral communications remained unchanged in the ECPA. In Edwards v. State Farm Ins. Co., 833 F.2d 535 (8th Cir. 1987), the court concluded the cordless phone conversation was an oral communication. \textit{Id.} at 538. However, since there was no reasonable expectation of privacy for cordless phone communications, the ECPA did not protect it as an oral communication either. \textit{Id.; see} Tyler v. Berodt, 877 F.2d 705, 707 (8th Cir. 1989), cert. denied, 110 S. Ct. 723 (1990) (cordless phone communication is oral). The privacy expectation for an oral communication under the ECPA is the same as the privacy expectation requirement for fourth amendment analysis. \textit{Tyler,} 877 F.2d at 706. Under both requirements, the person must exhibit a reasonable expectation of privacy. \textit{Id.}
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\textsuperscript{84} For a discussion of how the ECPA protects cellular phones, see \textit{supra} note 82.
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\textsuperscript{85} ECPA § 2515. This section provides the amendment’s exclusionary rule, and states:

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Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.
\end{quote}

\textit{Id.}

\textsuperscript{86} ECPA § 2511(4)(b)(ii). If the offender intercepts a cellular communication, and this is his first offense, he “shall be fined not more than $500.” \textit{Id.}

\textsuperscript{87} \textit{See} ECPA § 2520 (recovery of civil damages authorized).

\textsuperscript{88} \textit{See} ECPA §§ 2516-18. A federal judge may authorize the Federal Bureau of Investigation or its agent to intercept a wire, oral or electronic communication. ECPA § 2516(1). The judge may issue the order provided there is evidence of one of the several enumerated crimes. ECPA § 2525(1)(a)-(e). The ECPA also allows the state courts to issue interception orders. ECPA § 2516(2). Section 2518 provides for disclosure of the intercepted communication, while section 2519 provides the procedure to intercept a wire, oral or electronic communication. \textit{See} ECPA §§ 2518, 2519.

\textsuperscript{89} For specific sections of the Act that exclude cordless phones, see \textit{supra} note
these seemingly similar technologies on the ground that it was unwilling to protect communications which were so easily intercepted.\textsuperscript{90} Based on this premise, Congress specifically excluded the radio portion of a cordless phone communication from ECPA protection.\textsuperscript{91} Because Congress believed cellular phone communications were more difficult to intercept, and special or sophisticated radios were required to intercept these communications,\textsuperscript{92} Congress was willing to protect cellular phone use.\textsuperscript{93} Congress' belief is invalid because people with televisions, video cassette recorders and scanners can easily intercept cellular communications.\textsuperscript{94} Similarly, people can intercept cordless phone communications with AM/FM radios and other devices.\textsuperscript{95} Because both cellular and cordless communications are easily intercepted, Congress' discriminatory treatment of cordless communications under the ECPA is unjustified.

The more likely explanation for Congress' discriminatory treatment is the lobbying efforts of the cellular phone industry.\textsuperscript{96} Several representatives of the cellular industry and individual cellular phone manufacturers testified at the Congressional hearings.\textsuperscript{97} The industry was concerned that cellular communications would go unprotected if cellular communications were not covered under the ECPA.\textsuperscript{98} Manufacturers testified that the amendments should pro-

\textsuperscript{83.}
\textsuperscript{90.} See Admin. News, supra note 5, at 3566 (inappropriate to make criminal interception of cordless phones). Because cordless phones are easily intercepted, Congress excluded them from the Act. Id.; see Fiala, supra note 37, at 21 (cordless phones are easily intercepted).
\textsuperscript{91.} For a discussion of how the ECPA specifically excludes cordless phones, see supra note 83.
\textsuperscript{92.} See Admin. News, supra note 5, at 3563 (cellular phones are difficult to intercept).
\textsuperscript{93.} For a discussion of how the ECPA covers cellular phones, see supra note 82 and accompanying text.
\textsuperscript{94.} See Comment, supra note 58, at 346 (cellular calls can be intercepted by UHF televisions, channels 80-83 and VCR's); see also Note, Privacy Act, supra note 35, at 424 and n.60 (televisions and scanners intercept cellular phones).
\textsuperscript{96.} See supra note 80 and infra note 97 discussing how the cellular industry was a major force at the ECPA hearings.
\textsuperscript{97.} See, e.g., Hearings, supra note 1 (Quigley as representative of Pactel Mobile Co., Maker as representative for Cellular Telecommunications Industry and Stanton from Telecaster Network of America). The cellular industry wanted amendments to protect the privacy of cellular phones. See id. at 212, 214 (statement of Jones Knapp, Deputy Assistant Attorney General, Criminal Division, Dept. of Justice).
\textsuperscript{98.} See Hearings, supra note 1, at 33-34 (Congress must explicitly cover electronic communications). The cellular industry was concerned about the recent cases of United States v. Hall, 436 F.2d 193 (9th Cir. 1973); United States v. Hoffa, 436 F.2d 1243 (7th Cir. 1970); Dorsey v. Florida, 402 So.2d 1178 (Fla. 1981); Kansas v. Howard, 235 Kan. 236, 679 P.2d 197 (1984); Rhode Island v. Delaurier, 488 A.2d 688 (R.I. 1985). Id. It feared that privacy over cellular phones would go unprotected if
dect the privacy of cellular communications. In contrast, the cordless phone industry and manufacturers were noticeably absent from the Congressional records of the ECPA hearings. In fact, the hearings only briefly addressed cordless phones. Because both types of communications are easily intercepted, Congress should protect both communications equally.

Without ECPA protection, an individual must rely on other legal theories for protection. Lower courts, however, have rejected the fourth amendment as an alternative source of protection for cordless phones because cordless phone users do not have a reasonable expectation of privacy. In the absence of a reasonable expectation of privacy, the fourth amendment does not protect cordless phone users. Furthermore, the fourth amendment does not restrict the actions of private citizens. Instead, the offended party only has state remedies, such as suits based on the common law tort of invasion of privacy which includes, intrusion upon seclusion, publication of

Congr ess did not act. Id.

99. See generally Hearings, supra note 1 (cellular industry seeking ECPA protection).
100. Id. (the cordless industry as a whole was absent from the hearings).
101. Id. Cordless phones were not the focus of the hearings. Id.
102. For a discussion of fourth amendment protection, see supra notes 35-40 and accompanying text. For a discussion of decisions that have addressed privacy issues for cordless phones, see supra notes 71 and 76. For an analysis of the common law protection of privacy in this context, see infra notes 104-06, 108; see generally Comment, supra note 57, at 348 (limited protection for cordless phones under Communications Act of 1934, 47 U.S.C. § 605 (1982), recodified at 47 U.S.C. § 705(a)).

The Communication Act of 1934 provided protection for wire and radio communications prior to Title III. Edwards v. State Farm Ins. Co., 833 F.2d 535, 537-39 (8th Cir. 1987). Congress amended the Communication Act the same time it passed Title III. Id. The wiretap law took priority over the Communication Act. Id. At least two courts have held that although the Communication Act does not require an expectation of privacy, the offended individual must establish this fact. Id. See United States v. Rose, 669 F.2d 23, 26 (1st Cir. 1982) (since the Communication Act is subject to Title III, the Act must also require an expectation of privacy).

The Communications Act of 1934 prevents all unauthorized disclosure of radio communications. The Communication Act 47 U.S.C. § 605(a) (Supp. IV 1982). See Comment, supra note 58, at 348. The Act also provides civil remedies as well as criminal punishment. 47 U.S.C. § 605(d). Under this Act, the individual must establish both an interception followed by a revealing of the communication. Id. However, the Communication Act does not seem to be an adequate remedy. See Tyler v. Berodt, 877 F.2d 705, 707 (8th Cir. 1989), cert. denied, 110 S. Ct. 723 (1990) (plaintiff pleaded and failed on claims under the Communication Act); see also Edwards v. State Farm Ins. Co., 833 F.2d 535, 537 (5th Cir. 1987) (plaintiff's car phone communications not protected by Communication Act).

103. For an explanation of the fourth amendment as it applies to government officials, see supra note 35.
104. See Prosser, Privacy, 18 CALIF. L. REV. 383, 389-92 (1960). The common law action based on intrusion upon the seclusion or solitude of another may provide a civil remedy for an individual whose communications were intercepted. The intrusion must be in the nature of prying and objectionable to a reasonable man. Id. at 390-91. Also, "the area or thing into which someone pries must be, and be entitled to be, private." Id. at 391. The tort extends to eavesdropping and wire tapping. Id. at 390.
embarrassing private facts\textsuperscript{105} and objectionable false light.\textsuperscript{106}

For example, a claim for intrusion upon seclusion would be based on an eavesdropping theory.\textsuperscript{107} But once again, the offended party would have difficulty winning on the merits because of the need to establish a reasonable expectation of privacy in the area intruded upon.\textsuperscript{108} In some instances, if the intercepting party discloses lies about the offended party, the offended party may be able to base a cause of action on the tort of defamation.\textsuperscript{109}

These common law remedies are inadequate. Unless the Supreme Court addresses the fourth amendment issue and finds a reasonable expectation of privacy, the legislature should provide protection for cordless phones. In January of 1990, the Supreme Court had the opportunity to address this issue when \textit{Tyler v. Berodt}\textsuperscript{110} came before the Court. The Court, however, denied the writ of cer-

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\textsuperscript{105} Prosser, supra note 104, at 392-98. The elements of this tort are a public disclosure (publicity) of private facts which would be offensive to a reasonable person. \textit{Id.} Therefore, where a person intercepts a cordless communication and then discloses it to another party, he may be liable for a public disclosure of private embarrassing facts. However, the offended individual probably would not succeed on this cause of action. In \textit{Edwards v. State Farm Ins. Co.}, 833 F.2d 535 (5th Cir. 1987), the plaintiff pleaded an invasion of privacy based on Louisiana tort law. \textit{Id.} The \textit{Edwards} court held this claim must also fail for the same reasons the Communication Act and wiretap claims failed: there was no reasonable expectation of privacy. \textit{Id.} at 541. Since recovery is limited to disclosure of private facts, the plaintiff could not succeed on the issue. \textit{Id.} “No right to privacy attaches to material in the public view.” \textit{Id.} at 541 (citing \textit{Jaubert v. Crowing Post Signal, Inc.}, 375 So. 2d 1386, 1388 (La. 1979). For further discussion of this tort, see \textit{Corcoran v. Southwestern Bell Tel. Co.}, 572 S.W.2d 212 (Mo. 1978).

\textsuperscript{106} See Prosser, supra note 104, at 398-401. The tort of objectionable false light involves the disclosure of facts that place the individual in a false light and would be objectionable to a reasonable person. \textit{Id.} at 400. The false light does not have to be defamatory. \textit{Id.}

\textsuperscript{107} See supra note 104 (eavesdropping as intrusion upon seclusion).

\textsuperscript{108} See supra note 104 (noting necessity of reasonable expectation of privacy to prevail under intrusion upon seclusion).

\textsuperscript{109} See W. PROSSER AND W. KEETON, ON TORTS, 802 (5th ed. 1984). When an individual intercepts a cordless phone call, and then communicates what he heard, he may be liable for slander. Slander occurs when someone orally publicizes to a third person defamatory remarks about another. \textit{Id.} For example, in \textit{Tyler v. Berodt}, 877 F.2d 705 (8th Cir. 1989), \textit{cert. denied}, 110 S. Ct. 723 (1990), the Dixons, who intercepted Tyler’s cordless phone calls, thought he was a drug dealer. \textit{See Sanders, supra note 7, at 55.} The Dixons then communicated this belief to the police. \textit{Id.} Tyler was not a drug dealer, but instead he was a burglar. \textit{Id.} This scenario could be slander on the part of the Dixons.

\textsuperscript{110} \textit{Tyler v. Berodt}, 110 S. Ct. 723 (1990) (first opportunity for Supreme Court to address privacy of cordless phones).
Discriminatory Treatment for Similar Technology

Tyler applied for a writ of certiorari after the Eighth Circuit Court of Appeals held that cordless phone communications were not protected by federal law because Tyler did not have a justifiable expectation of privacy. As cordless phone use increases, the Supreme Court may again have the opportunity to address this issue.

V. SOLUTIONS TO THE INADEQUATE PROTECTION OF PRIVACY FOR CORDLESS PHONES

Several writers and the cellular industry itself have offered solutions to the problem of how to protect radio communications from unauthorized interference. One possible solution to guarantee that communications remain private is not to use radio phone technology at all. Instead, if an individual must communicate in confidence, he should use the ordinary line telephones which are covered by the ECPA. Because radio technology is so widespread and most telephone calls today are not completely transmitted within a wire, this is no longer a practical solution.

A second solution requires devices that encrypt radio communications. By scrambling the communication, people who intercept the conversation would not be able to understand them. Encrypting communications, however, substantially increases the cost of radio phones. The expense associated with encrypting thus makes

113. See Note, Privacy Act, supra note 35, at 444 (when sensitive conversation, avoid radio phones); see also NBC news, supra note 45 (best way to insure privacy of communications is not to use cordless phones).
114. See supra note 113 (to insure privacy do not use radio phones).
115. ECPA §§ 2510(1) and 2511 (protection for wire communications).
116. See Fiatal, supra note 37, at 17. Today, no telephone call is completely transmitted by wire. Id. The common telephone call, not only a cordless or cellular phone, at some point is transmitted by radio waves. Id. A call may travel through the air as microwave transmissions and via satellite. Id. The ECPA, however, covers these transmissions. Id.; see ECPA § 2510(1); see also ADMIN. News, supra note 5, at 3566 (wire communications includes long distance satellite or microwave facilities).
117. See ADMIN. News, supra note 5, at 3569. Encrypting is a process that scrambles radio signals and makes them intelligible. Id. The purpose of encrypting is to protect the contents of the communication. Id. One type of encrypting that Congress approves of is data encrypting standard. Id.; see generally Note, Privacy Act, supra note 35, at 425 and nn.20-25 (discussing encrypting and scrambling).
118. See ADMIN. News, supra note 5, at 3569 (encrypted signals are not readily accessible to the general public).
119. See Comment, supra note 58, at 345 n.66 (cost of cordless phone with security device is $179); see also Consumer Reports, supra note 7, at 682 ("clever technology has yet to squelch eavesdropping"). The cost of cordless phones without security devices range between $50 and $150. Consumer Reports, supra note 7, at 680.
encrypting a less favored solution.

The cellular industry has suggested a third solution that concerns the reception devices. The industry suggests manufacturers of scanners, televisions, radios and all other radio receiving devices alter production of these devices so that these devices do not have the ability to receive those frequencies allocated for cellular and cordless phone use. Since there are already millions of reception devices in existence, the effect of this solution may not be felt for years. Therefore, this solution does not provide immediate relief nor is it practical.

A fourth solution is for the FCC to change the frequency allocation for cellular and cordless phone use. The FCC could allocate a frequency band for cellular and cordless phones to frequencies outside the allocation ban for stereos and scanners. Such a requirement would allow the cellular and cordless phone industries to produce phones that existing common electronic equipment could not intercept. In order for this solution to be effective, however, the FCC would also have to strictly regulate the manufacturers of radio frequency devices. The FCC does not presently restrict manufacturers in what frequencies the devices may receive.

Most of the current technology on cordless phones only prevent piracy. Id. at 682. Piracy is when one cordless phone makes calls through another person's cordless phone base unit. Id. The result is that the non-owner's calls are billed to the owner's bill. Id.

Cf. 4 F.C.C. Rcd. at 2086 (some manufacturers are already voluntarily altering production to omit certain frequencies). The FCC, however, is not willing to compel manufacturers to block frequencies. Id.

Blocking is not practical because many frequencies used for protected communications under the ECPA are also allocated for non-protected communications. 4 F.C.C. Rcd. at 2085. By blocking, users would not be able to purchase devices to receive unprotected and public broadcasts.

Cordless phones can presently only operate under a frequency within 10 KHz of 46,610-49,970 MHz. Telecommunication, 47 C.F.R. § 15.232. The FCC has authorized cellular phones to operate between 825-845 MHz and 870-890 MHz. Id. § 22.900. When the previous frequency allocations are compared with the allocations for AM, FM, television receivers and scanners there is a noticeable overlap. This is why radio communications are intercepted. The AM broadcast band is 535-1605 KHz. Id. § 73.14. The FM broadcast band is 88-108 MHz. Id. § 73.201. While the television broadcast band is 54-806 MHz, Id. § 73.602, scanners operate on 30-890 MHz. Id. § 15.4(v).

For a listing of the frequency allocation overlaps, see supra note 124.

A radio frequency device is a receiver capable of receiving electromagnetic energy at any frequency between 9 KHz and 3,000,000 MHz of the radio spectrum. 47 C.F.R. § 15.3 (1989).

See generally Telecommunication, 47 C.F.R. § 15 (certain requirements for
this situation, the FCC would have to mandate that the manufacturers could only produce these devices with the ability to receive the radio frequencies presently allocated for TV's and FM and AM receivers.

The final solution, legislative protection for cordless phone users, is the most preferable solution to the ridiculous discriminatory treatment accorded cordless phones. Although Congress has already taken steps that protect cellular phone users, the justification for treating cordless phones differently from cellular phones is no longer valid. Both types of communications are easily intercepted. Therefore, Congress should now include cordless phone communications in the ECPA's definition of wire communications. By taking this step, Congress would remove the need to establish a reasonable expectation of privacy for actions involving an invasion of privacy in communications over cordless phones. Instead, the offended party would have to show that the intercepting party intentionally intercepted the cordless communication.

The ECPA only prohibits "intentional" interception and disclosure. Congress did not purport to punish an individual for accidentally receiving or intercepting a cellular phone communication. Since Congress' intention was not to punish the accidental reception of cellular communications, the same analysis applies in the cordless phone context. An individual who accidentally intercepted a com-

marketing, but does not restrict the device in what frequency they can receive). See supra notes 122-23 (FCC not willing to compel blocking).

128. For an explanation of the ECPA's protection of cellular telephones, see supra note 79.

129. For Congress' justification for discriminatory treatment, see supra notes 90 and 92 and accompanying text.

130. For a discussion of how easily cellular and cordless phone communications are intercepted, see supra notes 93 and 94.

131. See Comment, supra note 58, at 350 (ECPA should be amended to include cordless phones).

132. For a discussion of Congress' power to pass the ECPA, see supra note 79.

133. See ECPA § 2511(1)(a). This section provides the state of mind the offender must have in order to be subject to the ECPA. Id. The ECPA covers one who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire oral, or electronic communication." Id. (emphasis added). This intent requirement is also found in §§ 2511(1)(b)-(d).

134. Prior to the ECPA, the culpable state of mind under Title III was willful. See 18 U.S.C. § 2511(1)(a)-(d) (1982). Congress, however, changed the state of mind requirement from willful to intentional in order to clarify culpability under the ECPA. See ADMIN. NEWS, supra note 5, at 3560. The change reflects Congress' desire not to punish inadvertent reception of communications. Id. Congress made the change in response to the concerns of radio hobbyists. Id.

Under the ECPA, intent is to mean more than a voluntary act. Id. at 3577. Instead, intent is to mean when "one's state of mind is intentional as to one's conduct or the result of one's conduct if such conduct or result is one's conscious objective." Id.

135. For a discussion of how the ECPA does not punish accidental interception, see supra note 133.
dless phone communication would not be subject to the ECPA. Assuming, arguendo, that cordless phone communications are easier to intercept, this only means people are more likely to accidentally intercept them.

If the ECPA focuses on intent, it should not matter how hard an individual may work in order to intentionally receive or intercept a communication. The interceptor of radio communications is analogous to a burglar. The law punishes a person as a burglar no matter how hard he had to work to enter the house. Since the law does not treat a burglar who broke a window to enter a house any differently from a burglar who entered the house through an open window, the law should not treat an individual living next door to someone who owns and uses a cordless phone, and knows he can listen to his neighbor if he actively and purposely tunes his radio to the right frequency any differently from someone who owns a scanner and purposely tunes his scanner to the right frequency. Both parties are making an effort to intercept a communication and are intending the consequences of their actions, to intercept the communication, just as a burglar intends to enter the house by any means and commit a felony. The culpable state of mind is present, and there are similar acts by both individuals. Therefore, the courts should have the ability under the law to punish both parties equally.

136. Cf. ECPA § 2511 (only intentional interception prohibited).
137. Cf. United States v. Rose, 669 F.2d 23, 26 (1st Cir. 1982) (§ 605 protected radio communications regardless of the ease of which others could intercept them); United States v. Suglin, 226 F.2d 281, 286 (9th Cir. 1955) (ease of interception under Communications Act did not matter); United States v. Laughlin, 226 F. Supp. 112, 114 (D.D.C. 1964) (Communication Act protected privacy no matter how easily communication was monitored).
138. See, e.g., Lucas v. Wainright, 604 F.2d 373 (5th Cir. 1979) (breaking and entering constitutes the same crime as entering without breaking); Sweezy v. Garrison, 554 F. Supp. 481 (W.D. N.C. 1982) (pushing open an unlocked door constitutes a breaking for purposes of burglary); People v. Davis, 54 Ill. App. 3d 517, 369 N.E.2d 1376 (4th Dist. 1977) (use of force in entry is not a necessary element of burglary); People v. Shannon, 28 Ill. App. 3d 873, 329 N.E.2d 399 (1st Dist. 1975) (open door not a defense to burglary).
139. Cf. ADMIN. NEWS, supra note 5, at 3578 (acts can be intentional, regardless of whether one has evil purpose). Congress believed that those who steal to get money, whether they just enjoy it or want to aid the less fortunate, all commit the same crime. Id. If this is Congress' belief, why does Congress not treat those who intercept cordless phone communications criminals? If it were not for being specifically excluded, a person intercepting a cordless call would fulfill the ECPA's intent requirement. They intend to intercept the communication just as one who intends to intercept a cellular communication. See generally Note, Privacy Act, supra note 35, at 437-42 (discussion of ECPA's intent requirement). One commentator has stated that the courts should determine intentional interception, by deciding if the individual was involved in active surveillance or passive reception. Id. at 438. Active surveillance is information gathering from a focused and particular target. Id. Passive reception does not have a target. Id. at 439. The ECPA is to prevent surveillance. Id. at 438. If this is true, then the passive reception is accidental, and not subject to the ECPA. Id.
If Congress included cordless phones in the ECPA's ambit of protection, the Act would still cover only those government agents or private citizens who intentionally receive or reveal these communications.\textsuperscript{140} Such intentional conduct is precisely what our laws should prohibit. Therefore, the protection the ECPA provides for cellular phones, excluding illegally obtained communications from a trial, affording victims a civil cause of action against eavesdroppers\textsuperscript{141} and subjecting the eavesdropper to criminal penalties, such as a fine or imprisonment\textsuperscript{142} is equally suited to cordless communications. The ECPA would not prevent the interception of cordless phone communications, but instead would provide a remedy for the aggrieved party.

VI. Conclusion

A person's mobility and freedom when making a telephone call are no longer limited to how far the cord reaches or the location of the nearest phone booth. With this new mobility, the courts have said the individual gives up his privacy expectation. Congress responded with the ECPA, which protects cellular, wire and electronic communications, but not cordless phone communications. Consequently, a person traveling around the city can communicate with others from his car on a cellular phone and know that he has a remedy under the ECPA if someone invades his private conversation. In contrast, a person who uses a cordless phone in the confines of his home, expecting the law to protect his privacy, has no remedy if a person intentionally intercepts his cordless communication. Today, there is no meaningful difference between cellular and cordless phones for regulation purposes. Congress' feigned distinction is a distinction without a difference.

Whether an individual communicating over a cordless phone has a reasonable expectation of privacy protected by the fourth amendment remains unanswered by the Supreme Court. Many have offered solutions to the privacy concerns left unprotected by the Court. The obvious and easiest solution, however, is to include cordless phones in the ECPA. By so doing, Congress would give millions of people who presently use cordless phones the protection and remedies due them for intentional invasions of their privacy.

*Timothy R. Rabel*

\textsuperscript{140} ECPA § 2511(1)(a) (applies to anyone who intentionally intercepts).
\textsuperscript{141} ECPA §§ 2515 and 2520 (exclusionary rule and civil remedies).
\textsuperscript{142} ECPA § 2511(4) (punishment for intentional interception).